Supreme Court, U.S.

97 • 375 SEP 2 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WALTER GALE STEINHORST,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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39 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether one of the most basic fair trial rights granted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the right to an unbiased and impartial judge, may be unintentionally waived by a criminal defendant, when the defendant is facing a death sentence and is unaware of the facts underlying the waiver?

2. Whether the State may impose an affirmative burden upon Petitioner or his counsel to investigate the background of the Judge who presided over Petitioner's state law collateral attack on his conviction to discover grounds for recusal when (a) Petitioner had no reason to suspect that cause for recusal existed; (b) the Judge failed to properly recuse himself from the case, having previously represented the estate of one of the victims; and (c) the State knew about and failed to disclose the conflict?

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JURISDICTION

The Florida Supreme Court issued an opinion on June 5, 1997 (App. at 2-21.) The judgment became final and a mandate issued on July 7, 1997. (App. at 1.) This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CITATIONS OF OPINIONS ENTERED IN THIS MATTER

Following is a list of all reported decisions in connection with Petitioner's case, in descending order.

Steinhorst v State, 695 So 2d 1245 (Fla. 1997)
Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994)
Steinhorst v. State, 636 So. 2d 498 (Fla. 1994)
Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991)
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Steinhorst v. Wainwright, 477 So. 2d 537 (Fla. 1985)
Steinhorst v. State, 438 So. 2d 992 (Fla. App. 1983)
Steinhorst v. State, 412 So. 2d 332 (Fla. 1982)

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Mr. Steinhorst's appellate counsel moved both the Circuit Court of Florida and the Florida Supreme Court to void the post-trial judgment at issue here under the Due Process Clause, citing this Court's well-established rulings that trial by an impartial tribunal is a fundamental right of due process. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 464-65 (1971); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). (App. at 164-72.) When first raised with the Circuit Court, that court disregarded any due process implications by applying a state criminal statute that would prevent a defendant from raising judicial bias if not brought at the time of his initial post-conviction appeal. The Florida Supreme Court, by order dated April 21, 1994, while recognizing that the failure to ensure that Petitioner's post conviction motion was heard by an impartial judge raised serious due process concerns, decided to instead look to state

statutes that precluded a defendant from raising recusal unless he neither knew of the conflict nor could have discovered its existence by the exercise of due diligence. The Florida Supreme Court entered final judgment on June 5, 1997 when it determined that Petitioner had failed to meet the standard imposed by court to exercise due diligence in discovering this Judge's partiality. A mandate issued on July 7, 1997.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Florida Rules of Civil Procedure 1.540(h) and 3.850, which are set forth on pages 204-06 of the Appendix.

STATEMENT OF THE CASE

Unbeknownst to Petitioner, the same Florida trial judge who had summarily denied his motion for post-conviction relief and, on remand, again denied the same motion, had previously served as a lawyer for the estate one of the victims and who had, unbeknownst to Petitioner, recused himself from a co-defendant's collateral proceeding. Despite this clear appearance of judicial bias, the Florida Supreme Court, in a 5-4 decision, denied Petitioner's request for a hearing before a fair and unbiased judge.

The Florida Supreme Court's majority opinions in both the initial appeal by Petitioner in which he raised the issue of judicial partiality, and in the final and most recent appeal, completely ignore the obvious effect of their rulings on Petitioner's fundamental due process rights. Instead, the Florida Supreme Court bases its ruling on a state statute that would prevent Petitioner from being provided an unbiased judge if the fact of the prior judge's bias "could have been ascertained by the exercise of due diligence." (App. at 138.)

The Florida Supreme Court imposed this standard even though it concluded that the potential conflict by the trial judge was so severe as to cause the judge to recuse himself from the trial of one Petitioner's co-defendants, and yet

he failed to recuse himself from Petitioner's case or even to notify Petitioner of the potential conflict, "even though the reasons for recusal applied equally to both cases." *Id.* Moreover, the Florida Supreme Court then applied this standard in a way that would require Herculean efforts by Petitioner's counsel to discover the existence of the recusal order in a co-defendant's case – a document that they did not know existed and had no reason to believe existed. As one of the Florida Supreme Court dissenters noted, discovering the judicial conflict would be like finding "a needle in a haystack." (App. at 19.) This case presents an opportunity for this Court to correct a blatant miscarriage of justice by determining that the right to an unbiased judge cannot be circumscribed by state procedural rules that impose unwarranted and unjustified conditions on an individual's right to an impartial tribunal – one of most basic rights guaranteed by due process.

Background

In Panama City, Florida, on November 30, 1977, Petitioner Walter Gale Steinhorst ("Petitioner"), along with two other individuals, David Goodwin and Charlie Hughes, were indicted on three counts of murder. Petitioner alone was indicted on a fourth count of murder. The three cases were severed.

Petitioner's trial was held in April and May of 1978 before then-Florida Supreme Court Justice James C. Adkins, sitting by designation. The evidence presented at trial placed all three defendants at the scene of the murders, but no physical evidence was presented to link any of the defendants to the murders. Instead, the State presented circumstantial evidence and immunized testimony in its attempt to prove that the defendants were the murderers.

Petitioner was convicted on all four counts of murder, although the jury did not specify whether the verdicts were based on a finding of felony murder or pre-meditated murder. Petitioner was sentenced to death on the first three counts and was sentenced to life imprisonment on the fourth.

Defendant Goodwin was tried several weeks later and was also originally sentenced to death for three counts of murder.[1] Defendant Hughes, who remained a fugitive from the law until 1981, was also convicted of three counts of murder, but was sentenced to only thirty years in prison, of which he ultimately served less than five years. There was no rational reason for the vastly divergent lengths of the three defendant's sentences, and, in fact, Judge Adkins later testified that the evidence at the trials of both Petitioner and defendant Goodwin indicated that all three defendants were equally guilty. Judge Adkins further testified that his feeling was "that, more likely than not, David Goodwin killed the people" but that "Charlie Hughes, who, from the evidence presented, struck me as a real bad egg."[2]

In reference to Petitioner's obviously disproportionate sentence of death, Judge Adkins concluded by stating "I simply do not believe that the criminal justice system ought to work this way . . . I believe this situation ought to be rectified. I am not in a position to correct this disproportionate situation . . . I hope that somebody will do something about this. I wish I could."

Involvement By Judge W. Fred Turner

On February 13, 1986, Petitioner filed a motion for post-conviction relief in the Circuit Court of Florida pursuant to Florida Rule of Criminal Procedure 3.850. Normally a 3.850 motion would have been heard before Judge

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1 The Supreme Court later overturned Mr. Goodwin's death sentence. *Goodwin v. State*, 405 So. 2d 170 (1981).

2 Judge Adkins' testimony was presented in an affidavit submitted as an exhibit to Petitioner's post conviction motion.

Adkins, the trial judge,[3] but since Judge Adkins had become a sitting Florida Supreme Court Justice, Petitioner's 3.850 motion was assigned to Judge W. Fred Turner, whose later discovered conflict of interest is the subject of this Petition.

Judge Turner summarily denied the 3.850 motion without hearing on March 24, 1986. It was later established

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3 This fact is significant. Judge Adkins later testified about Petitioner's trial and the reasons why the case "left a bad taste in [his] mouth." (Adkins Aff. ¶ 6.) One problem Judge Adkins had was that he found it "extremely suspicious" that the victims had just "happened upon the drug operation" as claimed by the State, particularly given the remote location and time of night. (*Id.* ¶ 7.) Judge Adkins felt that the Petitioner was mischaracterized as a "hard man" and that the defense had failed to present witnesses, such as family members, to testify as to his true nature. (*Id.* ¶ 8.)

The issues raised by Judge Adkins are the very same issues Petitioner sought to present in the post conviction motion before Judge Turner that Judge Turner denied without ever having read the trial transcript. For example, Petitioner argued that the State had failed to turn over dozens of witness interview to Petitioner that would have supported the theory, *inter alia*, that the victims did not "happen upon" the drug operation but were at that location for the express purpose of attempting to steal the drugs being imported. *See Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of favorable evidence by the prosecution violates due process where evidence is material to guilt or sentencing). Further, Petitioner argued that he was prevented from offering into evidence nonstatutory mitigating evidence during the sentencing phrase of trial. Had he been permitted to do so, Petitioner could have and would have offered numerous witnesses, including several family members to testify about the strength of Petitioner's background and character.

that Judge Turner had never even seen the trial record before rendering his decision. (App. at 186.) Moreover, Judge Turner failed to provide Petitioner with notice of his denial of this motion, and, in fact, Petitioner did not learn of the decision until over seven months later, when Petitioner's counsel noticed a press release stating that the Governor of Florida had issued a warrant for Petitioner's execution.

Upon learning of the death warrant, on November 14, 1986, Petitioner requested a stay of execution and filed a motion with Judge Turner to vacate his order of March 24, 1986. On November 20, 1986, Judge Turner granted the request to vacate his prior order but simultaneously denied for a second time the motion for post-conviction relief. Again, Judge Turner denied the motion without examination of or access to the trial record and without conducting a hearing, let alone an evidentiary hearing, as required by Rule 3.850.

On November 21, 1986, Petitioner appealed Judge Turner's denial to the Florida Supreme Court and requested a stay of execution. On November 26, 1986, the Florida Supreme Court granted Petitioner's request for a stay of execution.[4] The Supreme Court also vacated Judge Turner's order and remanded the case for an evidentiary hearing. Specifically, the Florida Supreme Court ruled that Petitioner had presented sufficient evidence of error at his criminal trial to require an examination of the record and an evidentiary hearing. Judge Turner had therefore erred in failing to review the record or hold such a hearing.

At the insistence of the Florida Supreme Court, Judge Turner held an evidentiary hearing on Petitioner's post-conviction motion from September 16-18, 1987. (App. at 22-135.) On June 23, 1988, however, Judge Turner denied the motion for a third time. It was later discovered, and Judge

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4 *Steinhorst v. State*, 498 So. 2d 414 (Fla. 1986).

Turner admitted, that his decision was again made without his gaining access to the trial record.

On July 5, 1988, Petitioner filed a notice of appeal from the Circuit Court's denial of relief. On March 6, 1991, the Florida Supreme Court affirmed the Circuit Court.[5]

The Discovery of Judge Turner's Inherent Conflict of Interest

After all avenues of appeal in the state courts appeared to be exhausted, counsel for Petitioner[6] began to review the court files in connection Petitioner's federal habeas corpus proceedings. What counsel found was shocking. Buried in this file on a single sheet simply entitled "Order" was an order dated July 9, 1981, from Judge Turner, recusing himself from presiding over the trial of Petitioner's co-defendant Charlie Hughes on the grounds that he had previously represented the estate of one of the murder victims.

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5 *Steinhorst v. State*, 574 So. 2d 1075 (Fla. 1991). The dissent argued that there was *Hitchcock* error at the penalty phase. *Hitchcock v. Dugger*, 481 U.S. 393, 2d 347 (1987):

> The record before us discloses substantial mitigating evidence improperly excluded from Steinhorst's trial . . . For these reasons, I believe there is no question that the federal courts under their own precedent must grant relief if this Court fails to do so. No good reason exists to delay such relief any longer.

Id. at 1078

6 Petitioner has been represented since 1981 by the law firm of Fried, Frank, Harris, Shriver & Jacobson, which has served as pro bono counsel to Petitioner following Petitioner's direct appeal from his conviction.

Judge Turner had represented the Estate of Harold Sims. Petitioner was convicted of killing Mr. Sims. These facts alone create an obvious appearance of impropriety and bias. Moreover, one of the assets of the estate described by then-attorney Turner was a wrongful death claim, suggesting Judge Turner had preconceived notions of the facts and circumstances surrounding the murder.[7] (App. at 14.)

Petitioner's counsel located this recusal order in September, 1991, and on October 4, 1991, immediately appealed to the Circuit Court for relief from judgment pursuant to Florida Rule of Civil Procedure 1.540(h)(4) seeking to have Judge Turner's judgment declared null and void. (App. at 184-202.) Petitioner argued that Fla. R. Civ. P. 1.540 was the applicable vehicle for raising this previously undisclosed conflict. Under Rule 1.540 a motion is timely if made within a "reasonable time" of discovering the conflict. Having brought his motion within two weeks of discovering the recusal order, clearly Petitioner had met this requirement.

Petitioner's Claim of a Due Process Violation

Regardless of the vehicle used to raise this issue, however, Petitioner argued that the fundamental principles of due process required that Judge Turner's judgment be declared void. Citing cases such as *Pennoyer v. Neff*, 95 U.S. 714 (1877); *In re Murchison*, 349 U.S. 133 (1955) and *Tumey v. Ohio*, 273 U.S. 510, 522 (1927), Petitioner argued that even if another statutory vehicle was determined to be appropriate for raising this issue, that statute would be limited to the extent that

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7 Judge Turner's failure to recuse himself in this case was not his first deviation from judicial protocol. *See In re Turner*, 421 So. 2d 1077 (Fla. 1982) (Judge Turner's conduct in several cases subject to public reprimand as having brought the judiciary into disrepute).

it conflicted with Petitioner's right to an impartial tribunal under the Due Process clause of the Fourteenth Amendment. (App. at 198-200.)

On February 12, 1993, the Circuit Court entered a preliminary order requiring the State to respond to the Rule 1.540 petition within 30 days and the petitioner "shall likewise have thirty days from service of the State's response to respond." Despite this order, however, on April 12, 1993 -- two days before Petitioner's reply was due to be filed[8] -- the Circuit Court denied the motion without a hearing. (App. at 181-83.)

The Circuit Court based its ruling on its belief that Fla. R. Crim. P. 3.850 applied rather than Fla. R. Civ. P. 1.540. According to the Circuit Court, under Rule 3.850, Petitioner's motion was not timely. The Circuit Court further ruled that the judgment was not void and was not subject to collateral attack. (App. at 182.) The court ignored entirely the issue of Petitioner's fundamental right to an impartial tribunal and the effect of its ruling on Petitioner's due process rights under the United States Constitution.

On April 24, 1993 Petitioner filed a motion for rehearing, which was granted by the Circuit Court on July 8, 1993. At the same time, however, the Circuit Court denied the Rule 1.540 motion. Again the Circuit Court bypassed the due process concerns raised by Petitioner, instead relying on Fla. R. Crim. P. 3.850 and its statutory time bar.

On August 2, 1993, Petitioner appealed this decision to the Florida Supreme Court. (App. at 141-80.) Petitioner argued that the Circuit Court erred in holding that Rule 3.850, and not Rule 1.540, was the appropriate procedure

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[8] The State served its opposition on Petitioner's counsel on March 15, 1993. Petitioner's reply was therefore due on April 14, 1993.

for reopening the judgment due to the undisclosed conflict. Moreover, again Petitioner argued that the judgment by Judge Turner was void because it failed to comport with fundamental due process. (App. at 164-72.)

Petitioner's appellate counsel moved the Florida Supreme Court to void the post-trial judgment at issue here under the Due Process Clause, citing this Court's well-established doctrine that trial by an impartial tribunal is a fundamental right of due process.[9] *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (referring to issue of judicial bias, "the United States Supreme Court has dealt with precisely this issue in a case on point"); *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971) (due process requires that criminal defendant's case be heard by an impartial judge); *Mayberry v. Pennsylvania*, 400 U.S. 455, 464-65 (1971) (disregard for the appearance of impartiality is a due process violation which voids a judgment of contempt); *In re Murchison*, 349 U.S. 133, 136 (1955) (A fair trial in a fair tribunal is a basic requirement of due process); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (to subject a defendant to trial in a criminal case involving his liberty or property before judge having a direct, personal, substantial interest in convicting him is a denial of due process of law); *Pennoyer v. Neff*, 95 U.S. 714 (1878) (same); *Sandstrom v. Butterworth*, 738 F.2d 1200 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) (acknowledging fundamental due process right to impartial tribunal and affirming district court's order granting habeas corpus petition

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9 This Court may exercise jurisdiction over due process issues which are apparent on the face of the record and which constitute a basic, fundamental unfairness in the proceedings below. *Wood v. Georgia*, 450 U.S. 261, 264-65, and n.5 (1981). Clearly, such issues are apparent on this record.

due to trial judge's failure to recuse himself from determining whether petitioner was in contempt of court). (App. at 164-72.)

On April 21, 1994, the Florida Supreme Court issued its ruling on Petitioner's appeal. The Florida Supreme Court agreed with the State that Fla. R. Civ. P. 1.540 was not applicable, but ruled that the Circuit Court should have treated the motion as a Rule 3.850 motion. (App. at 136-40.)

In its opinion, the Florida Supreme Court recognized the grave impropriety of Judge Turner's having presided over Petitioner's post conviction proceeding, noting:

> Judge Turner recognized the potential for serious conflict and entered an order of recusal in the trial of one of Steinhorst's co-Defendants. No such recusal was ordered here, nor did the judge notify the parties of the potential conflict, even though the reasons for recusal applied equally to both cases.

(App. at 137-38.)

The court also recognized the serious due process concerns raised by this conflict:

> Moreover, such evidence would present grave due process concerns. A judge who is recused from a codefendant's case also must be recused from another codefendant's case if the reasons for recusal apply equally to both. There is no other conclusion that is consistent with one of the most important dictates of due process: that *proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair*. As this Court has noted in *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990):
>
> One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, § 9, Fla. Const.... "[D]ue process" embodies a

> fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const."[10]

(App. at 138-39.)

Despite the Florida Supreme Court's express recognition that Judge Turner's conflict impacted Petitioner's

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10 The fact that the Florida Supreme Court relied upon the Florida Constitution, and not the United States Constitution, does not defeat jurisdiction. It is clear that Petitioner urged the Court to reject Judge Turner's ruling based upon both the Florida and United States Constitutions, citing both federal and state case law in support of his position. Moreover, where the state court decision appears to be interwoven with federal law and the independence of any state law ground is unclear from the face of the opinion, then jurisdiction is not defeated. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (*citing Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). Such interweaving can occur where a state constitution is the basis for a decision, but the state court treats the both constitutions as equivalents. *Pennsylvania v. Muniz*, 496 U.S. 582 n.5 (1990).

That interweaving is the case here. Though the Florida Supreme Court appeared to rely on the state, rather than the federal, constitution, Florida law equates the state constitutional protections for due process to those guaranteed under the federal constitution. *Hill v. State*, 473 So. 2d 1253, 1256, 1258-59 (Fla. 1985), *Bonavista Condo. Assoc., Inc. v. Bystrom*, 520 So. 2d 84, 86 (Fla. Dist. Ct. App. 1988), *superseded by statute on other grounds*, *Brazilian Court Hotel Condo. Owner Assoc. v. Walker*, 584 So. 2d 609 (Fla. Dist. Ct. App. 1991); *The Florida Canners Assoc. v. State of Fla. Dept. Of Citrus*, 371 So. 2d 503, 513 (Fla. Dist. Ct. App. 1979), *aff'd. sub nom*, *The Coca-Cola Co., Food Div., Polk Cty., Fla. v. State of Fla., Dept. Of Citrus*, 406 So. 2d 1079 (Fla. 1981).

due process rights, the Court did not immediately void Judge Turner's order. Instead, the court ruled that under Fla. R. Crim. P. 3.850, Petitioner's claim would be deemed waived if the "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence."[11] Fla. R. Crim. P. 3.850 (b)(1). (App. at 139.) As a result, the court remanded the case for a factual determination of whether Petitioner knew, or could have known by the exercise of due diligence, about the recusal order.

On October 13, 1994 an evidentiary hearing was held before the Circuit Court on the issue remanded to it by the Florida Supreme Court. (App. at 22-137.) Without conceding that the standard now being imposed by the Florida Supreme Court complied with Petitioner's due process rights, Petitioner argued that he neither knew, nor could have known by the exercise of due diligence, about Judge Turner's conflict. Petitioner presented evidence showing that Judge Turner had never notified Petitioner or Petitioner's counsel of the grounds for his recusal in Hughes' case or even of the fact that he had recused himself. (App. at 207-08.) The State, through the prosecuting attorney, conceded that it was aware of the recusal yet made no attempt to notify Petitioner of it.

Moreover, Petitioner argued that the recusal order was never made available to Petitioner's counsel. Petitioner presented evidence that Petitioner's counsel had

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11 Although not expressly addressed by the Florida Supreme Court in both of its two recent decisions in this matter, Petitioner's reliance on those cases which expressly addressed the Due Process Clause under the United States Constitution is sufficient to establish that the federal question was raised below. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 n.5 (1979).

diligently reviewed the files made available to them at the Bay County Courthouse, but that the recusal order was not present in those files, which were given to Petitioner's defense team for review. The State's own witnesses acknowledged that the files were "a mess," that portions of the files of the various co-defendants were kept in different places, and that the clerks who were providing Petitioner's counsel with the files did not have access to all of the files. (App. at 104.) The State also acknowledged that the order did not appear on a docket sheet, as there was no docket sheet. (App. at 108.)

All of this evidence supported Petitioner's own witnesses' statements that the recusal order from co-defendant Hughes' file was not made available to Petitioner or his counsel in their initial review of the file in 1986 and in fact, was not made available to Petitioner until 1991 after the files were consolidated and reorganized.[12] Despite Petitioner's counsel's repeated requests prior to 1991 for all of the files, the recusal order was never provided to them. No amount of due diligence, argued Petitioner, could have uncovered what was not there and what Petitioner's counsel had no reason to believe existed in the first place.

On June 19, 1995, the Circuit Court issued an Order Denying Rehearing after Evidentiary Hearing. (App. at 207-10). The Court found that neither Petitioner nor his counsel knew of Judge Turner's recusal from the Hughes case, and that it was "clear that Judge Turner did not advise them of this fact." (App. at 207-08.) The Court found, however, that the recusal order was not misplaced and that no one from the

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12 Petitioner also presented evidence to show that Petitioner's counsel diligently attempted to contact co-defendant Hughes' counsel to discuss the case in an effort to determine if additional grounds for appeal existed, but that Hughes' counsel refused to cooperate. (App. at 32, 46-47.)

clerk's office had attempted to "conceal or hide it from Petitioner's counsel." (App. at 208.) Unbelievably, in the face of testimony from the court clerks that the files were a "mess" and were kept by piling papers in unmarked boxes, the Circuit Court blithely found that "[t]he contents of the files were there for them to review" and denied Petitioner's motion to set aside Judge Turner's judgment. (App. at 208-10.)

On July 17, 1995, Petitioner appealed this judgment to the Florida Supreme Court. Petitioner argued that the Circuit Court's factual findings were clearly erroneous and that the Circuit Court failed to properly apply the standard of "due diligence" set by the Florida Supreme Court, instead requiring an "extreme" diligence standard by requiring counsel to find something that it did not even know existed and could not be found.

In a 5-4 decision issued on June 5, 1997, the Florida Supreme Court denied Petitioner's appeal. (App. at 2-21.) The Court found that the evidence supported two conflicting theories on whether the recusal order could have been located with due diligence. (App. at 7.) By reviewing the record in the light most favorable to the "prevailing theory", the Court upheld the factual findings of the Circuit Court that Petitioner's counsel failed to exercise due diligence in locating the recusal order. *Id.*

The dissent by Justice Kogan attacked the majority decision for failing to address the serious due process concerns implicated by the Circuit Court's decision. (App. at 9-13.) According to the dissent, the majority's decision assumes, as its prior decision had, that Petitioner's due process rights could be waived, and more importantly, that those rights could be waived unknowingly and unintentionally without Petitioner's participation. Justice Kogan wrote:

> As I indicated in my prior opinion, I believe that Steinhorst's particular due process claim is nonwaivable under any construction of the facts. To hold otherwise casts upon the defendant an affirmative duty to investigate a judge's background for the possible sources of

> conflict. *See Lightbourne v. Dugger*, 549 So. 2d 1364, 1368 (Fla. 1989) (Barkett, J., concurring in part, dissenting in part). To impose such a duty is inconsistent with the dictates of our Constitution which, as the majority previously recognized, requires that proceedings involving criminal charges, especially the death penalty, must both be and appear to be fundamentally fair. Accordingly, I cannot agree that Steinhorst waived his claim that Judge Turner's undisclosed conflict of interest required a new 3.850 proceeding before a new and impartial judge.

(App. at 12-13.)

The nature of the conflict of interest, added by Justice Anstead in a second dissent, "fundamentally undermines the fairness of those death penalty proceedings," to such an extent, that it is a "blow to our justice system." (App. at 20-21.) Because it is a fundamental requirement of due process that any waiver of the right to trial (or hearing) before an unbiased tribunal must be "knowing and intelligent," Petitioner requests that this Court issue a writ of certiorari and review this matter on the merits.

REASONS FOR GRANTING THE WRIT

I. The Alleged Waiver did not Comport with Due Process

Petitioner's so-called "waiver" of his right to have his collateral proceedings conducted before a fair and impartial judge was not "knowing and intelligent," and therefore violated basic due process guarantees under the Fourteenth Amendment. Regardless of whether Petitioner's counsel exercised due diligence in searching the court file when preparing the original Rule 3.850 petition, any waiver of the right to an impartial tribunal had to be made by Petitioner personally, knowingly and intelligently. *See Dyas v. Lockhart*, 771 F.2d 1144, 1147 (8th Cir. 1985) (waiver of judicial bias must be "knowing and intelligent" to comport with due process). It is undisputed that Petitioner, who was residing on Florida's death row at the time, did not knowingly and intelligently consent to Judge Turner's presiding over his post-conviction proceedings despite the conflict.

It is well settled that "the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 117 S. Ct. 1793, 1797 (1997) (citations omitted). In *Bracy*, the judge presiding over the original trial was subsequently convicted of accepting bribes to fix trials. Although there was no evidence that the judge was influenced in Bracy's trial, the Court found that the possible bias was so extreme as to trigger Fourteenth Amendment Due Process concerns. *Id. See also Tumey v. Ohio*, 273 U.S. 510, 522 (1927) ("[t]he right to a fair trial is 'a basic requirement of due process' and includes the right to an unbiased judge.") (emphasis added) (quoting *In re Murchison*, 349 U.S. 133 (1955)); *United States v. Wade*, 931 F.2d 300, 304 (5th Cir.

1991) ("Courts have repeatedly stated the importance of unbiased and unprejudiced judges."), *cert. denied*, 502 U.S. 888 (1991).[13] When a right, such as the right to an unbiased tribunal, "is of such critical importance as to be an element of due process under the Fourteenth Amendment, a finding of waiver is not lightly to be made. *Moore v. Michigan*, 355 U.S. 155, 161 (1957).

This Court's body of precedent in this area begins with *Tumey v. Ohio*, 273 U.S. 510 (1927). In *Tumey*, this Court first defined the due process standard for recusal:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between

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13 While the majority of cases which address the issue of waiver of an impartial tribunal arise in the criminal context, the issue of judicial bias can raise constitutional concerns even in the civil context, such as post-conviction proceedings. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (in an insurance coverage litigation, states' decisions regarding judicial bias "not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (in a disability benefit case "[i]t is, of course, axiomatic that trial before an unbiased judge is essential to due process.") (citations omitted; internal quotations omitted). Judge Turner's presiding over Mr. Steinhorst's Rule 3.850 petition after representing Sims' estate is one of "the most extreme of cases" of improper judicial bias and therefore rises to the level of a constitutional violation. *See id.*

> the state and the accused denies the latter due process of law.

Id. at 532. This Court later revisited this issue in *Murchison*, holding that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Murchison*, 349 U.S. at 136; *see also Peters v. Kiff*, 407 U.S. 493, 501 (1972) (same); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 98 (3d Cir. 1992) (same); *Jenkins v. Sterlacci*, 849 F.2d 627, 631 (D.C. Cir. 1988) (same); *Daye v. Attorney Gen. of New York*, 696 F.2d 186, 196 (2d Cir. 1982) ("[u]nder the Due Process Clause there is a well developed right, established in a long line of cases, to a trial before an unbiased judge"), *cert. denied*, 464 U.S. 1084 (1984); *Los v. Los*, 595 A.2d 381, 383 (Del. 1991) ("[t]he requirement that judges be impartial is a fundamental principle of the administration of justice"); *State v. Olmstead*, 261 N.W.2d 880, 884 (N.D. 1978) ("trial before an unbiased judge is essential to due process"), *cert. denied*, 436 U.S. 918 (1978).

This Court further noted in *Murchison* that "our system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. Thus, the Court reaffirmed the central theory behind *Tumey*, 273 U.S. at 532 and *Offutt v. United States*, 348 U.S. 11, 14 (1954) (such a stringent rule may bar judges with no actual bias); *cf. Peters*, 407 U.S. at 502 (finding a well-established rule that even absent a showing of actual bias, due process denied by circumstances creating the appearance of bias).

In *Dyas*, a case brought under the Due Process clause and not under applicable state statutory recusal law, the trial was conducted by Judge Bobby Steele, whose nephew was the prosecutor and whose wife was the court stenographer. *Dyas*, 771 F.2d at 1146. Moreover, the prosecutor's son was dating the defense attorney's daughter at the time of the trial. *Id.* Although his attorney was obviously aware of the relationships from the beginning of the trial, the defendant never discovered them until closing arguments, when his attorney said:

> Thank God I've got a friend up there on that bench that's just as good to me as he is to his own kinfolks. You know, he offered to withdraw from this case and not try it because he has a nephew as the prosecuting attorney . . . and I said "Good God, I had rather try a case in front of Judge Bobby Steel than any judge in the United States because he's going to be fair to everybody, I'll guarantee you that."

Id. at 1148. When Dyas raised a claim of judicial bias on a post-conviction collateral attack, the Eighth Circuit raised the issue of waiver and remanded the case for a finding of whether Dyas "knew about and nevertheless declined to accept Judge Steele's recusal offer." *Dyas v. Lockhart*, 705 F.2d 993, 996 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983). The only evidence that Dyas knew about the recusal offer at all was the above-quoted excerpt from his attorney's closing, during which Dyas was present in the courtroom. *Dyas*, 771 F.2d at 1147. However, Dyas' silence in the face of the closing argument did not constitute a waiver of his due process right to a trial before an unbiased tribunal. Rather, the Eighth Circuit held that any waiver had to be "knowing and intelligent," concluding that

> we cannot accept the conclusion that Dyas waived his objection to Judge Steel's presence based on the information Dyas received for the first time in his counsel's closing statement . . . The district court's finding of a waiver here was clearly erroneous, particularly in light of the district court's finding that Dyas was unapprised of the relationship until the trial was over, and his finding that Dyas did not understand that he had an absolute right to require recusal.

Id. at 1147-48. In addition, the Dyas Court remarked that "[f]or Dyas to have waived his right in this fashion is a far cry from the Supreme Court's benchmark standard that a waiver is 'ordinarily an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* at 1147 (quoting *Johnson v.*

Zerbst, 304 U.S. 458, 464 (1938). Thus, the Dyas Court recognized that the due process right to trial before a tribunal lacking even the appearance of bias cannot be waived by the defendant's attorney, but must be waived, knowingly and intelligently, by the defendant himself.

In the face of a possible waiver of judicial bias, rather than imposing the "knowing and intelligent" standard required by due process, the Florida Supreme Court imposed the due diligence standard required procedurally under Rule 3.850 to determine whether a movant may raise an untimely claim. However, "the State's power to regulate procedural burdens [is] subject to proscription under the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1383 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)) Here, Florida's procedures to ensure that a defendant's due process right to a fair and impartial tribunal are woefully inadequate because the due diligence standard does not require the knowing and intelligent waiver that is the constitutional standard under *Dyas*. Instead, Florida procedure can result in the injustice in Petitioner's case: a completely unknowing waiver based upon what was in all likelihood a negligent mishandling of crucial documents by an unknown State employee.

Moreover, while applying such a harsh standard to Petitioner and his counsel, the Florida Supreme Court's decision completely relieved the two State officials who had actual knowledge of the facts -- Judge Turner and the prosecutor - from their duty to disclose the conflict and Judge Turner's prior recusal. This Court's decisions teach that the right to a fair tribunal cannot be abridged with such ease and insouciance. The Florida courts plainly erred when they failed to apply the knowing and intelligent waiver standard.

Thus, to determine whether Petitioner waived his right to bring his Rule 3.850 petition before a judge that was uninvolved, the Florida Supreme Court should have applied the standard used in *Dyas*: whether the waiver was effected by

Petitioner personally, and whether it was knowing and intelligent. The Florida Supreme Court erred when it held that Petitioner's rights were waived by failing to exercise "due diligence"; that error was of constitutional magnitude.[14]

Had the Florida Supreme Court applied the proper standard, the result – that Judge Turner's order should be voided and Petitioner's original 3.850 motion should be re-heard before an unbiased judge -- is clear. Here there is no question that Petitioner did not effect a "knowing and intelligent" waiver of his right to have his collateral proceedings conducted by an unbiased judge: Petitioner was on death row at the time and had no access to (or knowledge of) the recusal order in co-defendant Hughes' case. It is also undisputed that Petitioner's counsel did not have knowledge of the prior recusal or conflict. (App. at 4-5.) Thus counsel could not have advised Petitioner of his rights in connection

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14 Indeed, under Florida law, in capital cases, a "knowing and intelligent" waiver by the defendant personally is required to effect a waiver of rights "which go to the very heart of the adjudicatory process." *State v. Griffith*, 561 So. 2d 528, 529 (Fla. 1990) (waiver of right to counsel and right to a jury trial must be knowing and intelligent); *see also Peede v. State*, 474 So. 2d 808, 814 (Fla. 1985) (waiver of right to attend all or part of trial must be knowing and intelligent, *cert. denied*, 474 U.S. 909 (1986); *Harris v. State*, 438 So. 2d 787, 796 (Fla. 1983) (waiver of right to include jury instruction on lesser-included offenses must be knowing and intelligent, *cert. denied*, 493 U.S. 1011 (1989)). It is difficult to imagine a right that is less central to the "heart of the adjudicatory process" than the right to a trial conducted by an impartial jurist. *See Bracy*, 117 S. Ct. at 1797. It was clear error for the Florida court to hold that Petitioner waived that right merely because there was some evidence that counsel could have found the recusal order earlier. (App. at 7.)

with any waiver. It is undisputed that Petitioner did not effect a "relinquishment or abandonment of a known right" within the meaning of *Zerbst* whether or not his counsel failed to exercise due diligence in examining the file. Other than by seeing that order, there was no reason for Petitioner to know that Judge Turner had represented Sims' estate after the murders, or to know that Judge Turner had included a wrongful death claim in his valuation of that estate. Finally, the fact that both Judge Turner and the prosecutor did not disclose the prior recusal, and Judge Turner's administration of the victim's estate, was completely outside Petitioner's knowledge and control.

II. This Court Should Decide How the Due Process Clause Limits a State from Using Procedural Bars to Deprive a Petitioner Under a Death Sentence from Having His State Post Conviction Proceeding Heard Before an Unbiased Judge

Although this Court has made clear that adjudication by a biased tribunal is a prima facie violation of fundamental due process rights, it has not set forth guidelines of how those rights may be limited procedural burdens imposed by the states. Sixth Amendment jurisprudence seems to indicate the appropriate doctrine, but an express decision from this Court is needed to implement that approach. Additionally, state law appears to lag behind the federal courts in this respect, and a decision in this case would equalize due process protections in this regard between the state and federal courts. Therefore, this Court should grant certiorari.

A. The Automatic Reversal Rule for Fundamental Due Process Violations Should Apply to State Decisions as Well

This Court held, in 1893, that a decree issuing from a court with an "interested" judge (in violation of the Judiciary Act of 1891) was unlawful and therefore void. *See American Construction Co. v. Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372, 387 (1893). Although due process principles demand a similarly automatic reversal where

a judge with a clear conflict of interest adjudicates a capital case, this Court has not had the occasion to rule on this issue.

However, this Court has had occasion to rule on the issue with respect to the Sixth Amendment right to counsel. In *Wood v. Georgia*, this Court held that fundamental due process rights are compromised where a criminal defense is compromised by defense counsel's actual conflict of interest. *Wood,*, 450 U.S. at 273-74. Drawing on that decision, as well as *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Second Circuit Court of Appeals has held that where a court ignores a possible conflict of interest for defense counsel, the resulting decision should be automatically reversed. *United States. v. Levy*, 25 F.3d 146, 153-54 (2d Cir. 1994) (applying rule on direct appeal); *Ciak v. United States*, 59 F. 3d 296, 302 (2d Cir. 1995) (applying rule to collateral proceedings). Other federal courts have adopted that decision as well. *See Selsor v. Kaiser*, 81 F.3d 1492 (10th Cir. 1996); *United States v. Fish*, 34 F.3d 488 (7th Cir. 1994); *Cox v. Norris*, 958 F. Supp. 411 (E.D. Ark. 1996).

That approach also follows from this Court's decision in *U.S. v. Agurs*, where it drew a sharp distinction between the burdens a petitioner need bear in seeking post-trial relief based on newly-discovered evidence:

> On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal [but need only show that the additional evidence creates a reasonable doubt as to guilt].

United States. v. Agurs, 427 U.S. 97, 111 (1976).

These cases derive from the state's failure to investigate and act upon counsel's potential conflict of interest, and therefore from the state's role in denying the fundamental

right to effective assistance of counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Those same principles should apply with even stronger force where it is both the judge and the prosecutor who are aware of a conflict of interest compromising the administration of justice but failed to disclose it. This can be no less offensive to due process principles than a conflict of interest suffered by defense counsel.

State courts, particularly Florida's, have not yet uniformly adopted this distinction concerning evidence newly uncovered from a neutral source versus evidence of a fundamental constitutional violation which was within the state's possession and knowledge. *See e.g.*, Fla. R. Crim. Pr. 3.850. The Florida Rule, for example, treats all claims arising from newly discovered evidence alike, without distinguishing the nature of the claim (constitutional versus technical errors) or the nature of the evidence (discovered from a neutral party or within the possession and knowledge of the state). Petitioners bringing such claims must not only produce a preponderance of evidence in their favor, but also produce a preponderance of evidence regarding whether or not the evidence could have been uncovered within two years following conviction. While this may comport with due process principles where the evidence arises from a third party, it cannot stand similarly where it is the state which has withheld the evidence and when the state should bear an affirmative burden as to its disclosure.

In essence, criminal defendants, even those under sentence of death, are subject to two burdens of proof, while the State has none and any doubts are resolved in its favor. This contradicts this Court's statement in *Agurs* that, "[i]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Agurs, supra*, at 111; *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

Here, it is the State itself which was aware of its own conflict of interest yet failed to preserve Petitioner's due process rights. The burden was on the Judge to disclose the conflict and recuse himself. The burden was on the prosecutor, the State's attorney, who knew of the conflict and the prior recusal, to disclose the facts to Petitioner and his counsel. The burden was also on the State to keep its court files organized in a fashion so that the prior recusal would have been readily apparent to Petitioner.[15] That burden cannot be shifted to

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15 The extreme unlikelihood of Petitioner's ever having located the recusal order was recognized by a dissenting opinion by the Florida Supreme Court (App. at 19-20):

> The "order" here was literally "a needle in a haystack," that we are holding voluntary collateral counsel should have found even sooner than they did. Of course, a defendant cannot ignore what is plainly there for him to see. But there was nothing here for the defendant to "plainly" see. Even under the majority's analysis, it is apparent that the State never refuted defense counsels' account of how and when they finally discovered by chance the recusal order located among papers concerning another defendant's case. In fact, the State verified the incredible mess that the court files were in. In addition, it is undisputed that the "order" in question was not specially titled to reflect its content and was not identified on any court docket, so as to alert a reader of its existence or importance. The bottom line is that these records were a mess, and that counsel exercised great diligence in actually locating something that they should have had no need to even be

Footnote continued

Petitioner who was unaware of the conflict and had no reason to even suspect that it was present. *See Dobbs v. Zant*, 506 U.S. 362 (1993). In *Dobbs*, a state prisoner under sentence of death sought to supplement the record on appeal by requiring the Court of Appeals for the Eleventh Circuit to consider the transcript of sentencing. The Court of Appeals denied the request as untimely. This Court reversed, ruling that it was error for the Court of Appeals to refuse to consider the transcript where the delay in discovering the transcript was caused by the State's own failure to transcribe the sentencing hearing.

Dobbs is on all fours with this case. Here, as in *Dobbs*, the Petitioner's due process rights should not be comprised because of a negligent error on the part of the State.

B. The State Should Bear the Burden When the Issue is a Denial of a Fundamental Right to Due Process

This Court should grant certiorari to decide whether the Due Process Clause requires the state to carry the burden of proof for procedural barriers to vindication of fundamental substantive constitutional rights in capital cases.

The seminal case of *Chapman v. California* established that adjudication by a biased judge violates fundamental constitutional rights to such a degree that the error cannot be deemed "harmless," and once a petitioner establishes such error, he is entitled to relief without further proof. *Chapman v. California*, 386 U.S. 16, 23-24 (1967). In later

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looking for anyway – something the court and the State had a moral, ethical and legal obligation to tell the defense about from the beginning.

cases, this Court has made it clear that a petitioner need only establish such fundamental error, such as a biased judge, in order to receive relief. *Rose v. Clark*, 478 U.S. 570, 577 (1986) (adjudication by biased judge requires "reversal without regard to the evidence in the particular case"); *United States. v. Olano*, 507 U.S. 725, 734-35 (1993) (criminal litigant entitled to relief under Federal Rule of Criminal Procedure 52(b) once he has satisfied the burden of proof that a prejudicial, and not a harmless, error has occurred); *O'Neal v. McAninch*, 513 U.S. 432 (1995) (federal habeas petitioner entitled to relief upon satisfying burden of proof that the trial record was merely evenly balanced as to the harmlessness or substantial and prejudicial effect of an alleged constitutional error).

Florida's requirement that Petitioner exercise "due diligence", which in this case amounted to impossible diligence, goes beyond this Court's interpretation of any burden permitted by the Due Process Clause and, to that extent, violates the Clause. As the Court noted in *O'Neal*, although the state has a valid interest in the finality of its judgments, that interest is diminished by the state's own responsibility for the error itself. *Id.* at 443. Moreover, Florida's added standard of proof does not "decrease the risk of error, but simply reallocates that risk between the parties." *Cooper v. Oklahoma*, 116 S. Ct. at 1383 (citation omitted). Such a reallocation in the face of a fundamental constitutional error, not just a technical or statutory one, is without sound basis, especially where an individual's life is at stake.

A writ of certiorari is particularly warranted on the egregious and undisputed facts of Petitioner's case and the fundamental unfairness of Florida's application of a "double" burden of proof. The Florida Supreme Court agreed that Petitioner had established Judge Turner's blatant conflict of interest and the resulting violation of his fundamental constitutional right to an impartial tribunal. Neither did that Court dispute that Petitioner had produced sufficient evidence of his counsel's diligence to create (at the least) a balanced record of whether or not Judge Turner's bias could have been uncovered sooner. Even the State's witnesses admitted that the

files revealing the conflict were generally "disorganized," and were located in various locations at the courthouse, including some files located in a basement vault not even accessible to the clerks who were providing the files to Petitioner's defense team. (App. at 110, 113, 118-21.) Nevertheless, Petitioner was given the burden of locating the recusal order (an unknown document) despite the fact that the State – in the person of Judge Turner and the prosecutor -- was well aware of its existence yet failed to disclose it.

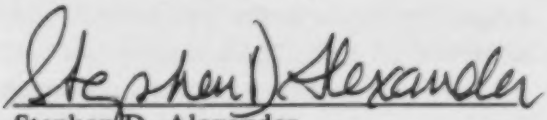
Without the added burden of proving diligence, Petitioner would have satisfied the single burden imposed by *Chapman* and its progeny. Under *O'Neal* in particular, a petitioner should not have to carry a burden beyond that. This Court should grant a writ of certiorari to implement Due Process Clause limitations on a state's procedural rules, which can be used to deprive a defendant under sentence of death of even the most fundamental due process right – the right to have his post conviction claims heard before an unbiased judge.

CONCLUSION

The record in this case presents issues ripe for this Court's review. A defendant sitting on Florida's death row has been denied one of the most rudimentary rights

guaranteed by the Due Process Clause – that of the right to an unbiased adjudicator. A state cannot not be permitted to impose unjustified and, in this case, unattainable standards on a defendant's right to due process of law. Petitioner respectfully requests that the petition for certiorari be granted.

Respectfully submitted,



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